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April 8, 1993

Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20054

Re: Scripps Howard Broadcasting Company
MM Docket 93-94

Dear Ms. Searcy:

Transmitted herewith, on behalf of Scripps Howard Broadcasting Company, licensee of Television Station WMAR-TV, Baltimore, Maryland, and a party in the above referenced proceeding is an original and six (6) copies of its Petition for Certification.

If you have any questions regarding this matter, please contact the undersigned.

Very truly yours,

Kenneth C. Howard, Jr.
Counsel for Scripps Howard
Broadcasting Company

cc: The Honorable Richard L. Sippel (with enclosures)
Ms. Barbara Kreisman (with enclosures)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	)	MM Docket No. 93-94
	)	
Scripps Howard Broadcasting Company	)	FCC File No. BRCT-910603KX
	)	
For Renewal of License of Station WMAR-TV, Baltimore, Maryland	)	

alternatively Section 1.115(e)(3), of the Commission's rules, hereby requests the certification of the two questions raised by the attached "Application for Review" to the full Federal Communications Commission ("Commission").

The Section 1.106 process is appropriate because it addresses a more limited class of questions than Section 1.115(e)(3), and because there is no justification for granting less procedural benefit on a meritorious issue to an applicant who has never been heard by the Commission than to one who has. In addition, in adopting the short 5-page limit applicable under Section 1.115, the Commission expressed the view that "as a matter of common practice, cases involving controversies over issues will be acted upon by the Commission." Adjudicatory Re-regulation Proposals, 36 Rad. Reg. 2d 1203, 1212 (1976). The current matter certainly involved a controversy, and the 5-page limit should not apply.

Should Section 1.106 nevertheless be deemed inapplicable, Scripps Howard asks for certification under Section 1.115(e)(3).[2]

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47 C.F.R. § 1.106(a)(2).

[2] The relevant part of Section 1.115(e)(3) provides:

> Applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified

The arguments raised herein show that this standard is met. In this event, Scripps Howard would make appropriate revisions to the application for review, including adding a request for waiver of the 5-page limit.

I. This Petition meets the procedural standards for certification set out in Section 1.106(a)(2) of the Commission's Rules.

Certification is warranted here under the principle announced in the adoption of Section 1.106(a)(2) that there should be a vehicle for immediate review where a substantial question exists under existing Commission policy as to whether the need for a hearing exists. As the Commission said:

> It is possible for the Commission to err as to policy in designating an application for hearing and for policy to change following designation in such a way as to obviate the need for hearing. A party should not, in such circumstances, be forced to go through a full evidentiary hearing before having an opportunity to raise the policy issue . . . . This procedure is available to any party to a case designated for hearing . . . .

Summary Decision Procedures, 24 Rad. Reg. 2d 1715, 1722 (1972).

Favorable resolution of the issue presented in the Application would necessarily negate the need for hearing by

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> the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation . . . .

47 C.F.R. § 1.115(e)(3).

requiring the dismissal of Four Jacks' application. See, e.g., Big Wyoming Broadcasting Corp., 2 F.C.C. Rec. 3493 (1987). In addition, the issues presented for consideration concern the staff's violation of established Commission policy as reflected in the Commission's inconsistent application rule and its precedents applying that rule. There is no dispute concerning the underlying facts. Absent review at this time, these determinative policy questions cannot be addressed before the conclusion of this possibly lengthy comparative renewal hearing.

It is particularly appropriate that these matters should be addressed in advance of the hearing because the rule relied upon by Scripps Howard is intended to protect against the unwarranted expenditure of Commission resources. It would be ironic if the Commission were not permitted an opportunity to correct the staff's error here until much of the harm its rule is intended to

The controlling holding is that the inconsistent application rule, Section 73.3518 of the Rules, "was not intended to apply to circumstances such as those before us." See HDO at ¶ 3. This odd phrasing suggests that the staff recognized in fact that the rule does apply by its terms, but the HDO offers no explanation of how the staff discerned that the Commission intended something other than what the rule expressly states.

The HDO attempts to buttress its conclusion with declarations (1) that the Four Jacks' principals have pledged to divest their ownership of Channel 45 if they are successful in winning Channel 2, and (2) that the Channel 45 renewal application (which is the inconsistent application at issue here) has been granted. Id. Both these rationales, however, are plainly inapplicable under well established Commission precedent if the inconsistent application rules does apply. See discussion in Application for Review at §§ III(C) and III(D). Accordingly, these rationales could not be of use to the staff in making the prerequisite determination of whether the rule applies.

> principals--who seek to operate on a new channel while at the same time pursuing a renewal application for their existing authorization in the same community must seek the new channel by modification of their existing channel's authorization rather than by applying for a new facility. To pursue a new authorization--whether directly or through a newly created shell corporation such as Four Jacks--violates the plain terms and the intent of the inconsistent application rule.

See discussion of Wabash Valley Broadcasting Corp. in Application for Review at § III(B); see also § III(E).

Separately, the Commission has evidenced a policy against letting applicants claim they are proposing new facilities when in fact their proposal is one to change operating frequencies. In Southern Keswick, the Commission rejected such an applicant's proposal for a new facility by holding--despite the applicant's strong protestations--that the applicant in reality was pursuing a modification of its existing channel's authorization, and that this action would leave it nothing to sell. See Application for Review at § III(F). Four Jacks' proposal appears to be a variation of this Commission-disapproved scheme to sell an interest which should revert to the public if the applicant should succeed in using the Commission's comparative hearing process to relocate its principals' authorized service on Channel 45, but the HDO failed to recognize the policy's existence so as to consider its applicability.

Encouraging such use of scarce public resources for private purposes rather than those intended by the Commission and Congress in setting up the resource-intensive comparative hearing process unduly commits public resources to private interests and prejudices other applicants by taking resources from the processing of their applications. See Application for Review at § III(G).

Relatedly, following the HDO's new policy would actually open the comparative process to situations where there would be no possible gain to the public and where affirmative risks of harm to the public interest in the affected market would actually result. It plainly would offer an incentive to applicant licensees to use Commission's scarce resources to seek immense private gain from sale of their old authorization rather than for any improvement in signal coverage. In fact, under the HDO's policy, the Commission would not even be able to limit a licensee's use of these processes to alleged "upgrades." That the relocation from Channel 45 to Channel 2 is an "upgrade" was not a factor in the staff's decision. Id.

Without the inconsistent application rule's prohibition of such applications for new facilities, licensees might pursue the private gain available from sale of their existing facilities by attacking the renewal of a station with equal or even lesser coverage. What policy would preclude a Channel 4 licensee from overfiling its Channel 9 competitor? The private interest in

such a filing is plain, but where is the public interest in permitting such a use of the Commission's resources? Id.

Finally and perhaps most ominously, the HDO's policy change would encourage a practice that would have inherent risks to the selections of the best new entrant into the affected market. If the challenger wins, it will select its own new competitor. This is a possibility many competitors would relish. The Commission, on the other hand, could consider only whether the proposed assignee is minimally qualified. The challenger's economic incentive of attaining the highest price would certainly be tempered by the conflicting economic incentive to select a weak competitor. To encourage this potentially market distorting process as the necessary selection process for the sole new voice in a market subsequent to an extended expenditure of Commission resources in a comparative hearing would not appear to serve the public interest. The comparative hearing process is intended to lead to selection of the best possible service providers for the community. The new policy would conflict directly with the Commission's determination that it may rely on the proper operation of market forces and the existence of vigorous competition as a means of assuring that broadcast licensees serve the public interest. Id.

III. Conclusion

As explained more fully in the Application for Review, the HDO thus plainly violates consistent Commission policy expressed

by (1) a literal reading of the inconsistent application rule, (2) by the Wabash Valley decision involving an inconsistent renewal application, and (3) by the Southern Keswick decision involving an applicant who--like Four Jacks--expressly disavowed any intent to pursue the appropriate path of modifying its existing authorization but was deemed to be required to pursue that process. Because the HDO violates established Commission policy that the inconsistent application rule applies here, and because established Commission policy requires the dismissal of the last-filed inconsistent application, certification of the attached Application for Review is appropriate. Commission action on Scripps Howard's Application for Review will properly abrogate the need for this hearing--directly furthering the purposes of the rule at issue here and protecting the integrity of the Commission's processes.

Respectfully submitted,

SCRIPPS HOWARD BROADCASTING COMPANY

By: _____
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April 8, 1993

Counsel to Scripps Howard

PROPOSED

APPLICATION FOR REVIEW

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	)	MM Docket No. 93-94
	)	
Scripps Howard Broadcasting Company	)	FCC File No. BRCT-910603KX
	)	
For Renewal of License of Station WMAR-TV, Baltimore, Maryland	)	
	)	
and	)	

[redacted]

SUMMARY

Scripps Howard asks the Commission to review that part of a Hearing Designation Order which refused to follow well established Commission policy that the inconsistent application rule requires the dismissal of the application for new facilities filed by Four Jacks Broadcasting, Inc. The dismissal of this application would eliminate the need for the comparative renewal hearing.

The staff did not and indeed could not cite any authority for its erroneous conclusion that the inconsistent application rule "was not intended" to apply here. The rule by its terms is applicable because the one-to-a-market rule prohibited granting the applicant's proposal for a new facility on Channel 2 while the same persons' inconsistent Channel 45 renewal application was pending. The staff further ignored a Commission decision addressing almost identical facts which held that the rule does apply to the very type applications present here: a television

precludes departing from precedent on the ground that the applicant's renewal happened to be granted quickly.

The staff's final point relies upon the "straw man" policy

in the market on which the Commission relies to ensure public service.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

3:00 p.m.
4/8/93

In re Applications of	)	MM Docket No. 93-94
Scripps Howard Broadcasting Company	)	FCC File No. BRCT-910603KX
For Renewal of License of Station WMAR-TV, Baltimore, Maryland	)	
and	)	
Four Jacks Broadcasting, Inc.	)	FCC File No. BPCT-910903KE
For a Construction Permit For a New Television Facility on Channel 2 in Baltimore, Maryland	)	

TO: The Commission

APPLICATION FOR REVIEW

Scripps Howard Broadcasting Company, through counsel and in accord with the certification issued on _____ by Presiding Judge Richard L. Sippel, hereby seeks Commission review of the Hearing Designation Order issued under delegated authority by the Chief, Video Services Division, DA 93-340 (released April 1, 1993) (copy attached). Commission consideration is warranted pursuant to Section 1.106(a)(2) of the Commission's Rules, 47 C.F.R. § 1.106(a)(2) (1992), because grant of the relief requested here would eliminate the need for a hearing, and no questions of fact are presented.

I. Questions for Review

A. Whether the Commission's staff committed error in conflict with the express terms of the Commission's "inconsistent application" rule and with directly applicable Commission precedent by holding that this rule does not apply to prohibit the filing of an application for new television facilities that was inconsistent with the same applicant's then pending renewal application for a television station on a different channel in the same market.

B. Whether the staff therefore improperly failed to apply the required remedy that Four Jacks Broadcasting, Inc.'s inconsistent application for new facilities be dismissed--thereby avoiding the need for the designated comparative hearing.

II. Introduction

On September 3, 1991, Four Jacks Broadcasting, Inc. ("Four Jacks") filed the above-captioned application for new facilities that is mutually exclusive with the above-captioned application of Scripps Howard Broadcasting Company ("Scripps Howard") for renewal of license of Station WMAR-TV, Channel 2, Baltimore, Maryland. Scripps Howard argued in a Petition to Dismiss filed on May 1, 1992 that the four Smith brothers ("the Smiths")--who constitute the sole owners of both (1) Four Jacks and (2) Chesapeake Television, the licensee of Station WBFF(TV), Channel 45, Baltimore--violated

the inconsistent application rule, Section 73.3518.[1] By filing an application for new television facilities on Channel 2 while they were pursuing an application for renewal of Channel 45's authorization in the same market, they wrongly filed an application that could not be granted so long as that renewal application remained pending. The very terms of the inconsistent application rule thus barred the filing of the Four Jacks application for new facilities. See n.1, supra. Commission precedent holds that such authority can be pursued simultaneously with the renewal application only via an application to modify the applicant's current authorization and not through the filing of an application for new facilities. Wabash Valley Broadcasting Corp., 18 Rad. Reg. (P&F) 559 (1959).

Four Jacks opposed the Petition on May 14, 1992, and Scripps Howard replied on May 26, 1992. On April 1, 1993, the Chief, Video Services Division ("VSD") denied Scripps Howard's Petition in a Hearing Designation Order ("HDO"). HDO at ¶ 3. This order also

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[1] Section 73.3518 provides:

> While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.

47 C.F.R. § 73.3518 (1991). This long standing rule previously has been set out at Section 1.362, see WSTV, Inc., 8 Rad. Reg. (P&F) 854, 855 n.3 (1953); at Section 1.308, see Wabash Valley Broadcasting Corp., 18 Rad. Reg. 559, 566 n.3 (1959); and at Section 1.518, see Chapman Radio and Television Co., 20 Rad. Reg. 2d 1144, 1148 n.9 (Rev. Bd. 1971). The text has remained substantively unchanged.

designated the two mutually exclusive applications for comparative hearing.

III. Factors Warranting the Commission's Consideration.

A. The denial of the Petition to Dismiss is in conflict with the express terms of the inconsistent application rule.

The VSD cites no Commission or other authority for its erroneous conclusion that the inconsistent application rule "was not intended" to apply to preclude an application seeking an authorization for new facilities where such a grant would conflict with a pending renewal application. Indeed, Scripps Howard's research indicates that no such authority exists. Absent some Commission precedent undermining the rule's express provisions, the staff was obliged to follow the letter of the rule.

By its terms the rule does apply. First, the principals of the two corporate applicants are identical. Where the principals of two corporations are the same persons holding the same ownership percentages, they are obviously covered by the terms of the inconsistent application rule, see n.1, supra, and indeed, a mere majority of shares in common would do. See Big Wyoming Broadcasting Corp., 2 F.C.C. Rec. 3493, 3494 (1987). The HDO itself recognizes that the principals of Four Jacks--the Smiths--are also the owners of the Channel 45 licensee.

Second, authority to operate on Channel 2 in Baltimore could not be granted to Four Jacks' owners while they pursued their application for renewal of Channel 45 in the same community. Grant

multiple ownership rule.[2] Commission precedent confirms that an applicant's failure to comply with multiple ownership constraints at the initial application stage is an inconsistency which warrants invocation of the inconsistent application rule and dismissal of any violative application. See, e.g., WSTV, Inc., 43 F.C.C. 1254, recon. denied, 17 F.C.C. 530 (1953).

B. The staff's order is in direct conflict with *Wabash Valley Broadcasting Corp.'s* express holding that the inconsistent application rule (1) does apply to conflicts involving renewal applications and (2) precludes the filing of an application for new facilities that is inconsistent with a renewal application for a station in the same service in the same community.

While the situation posed by the Four Jacks application is highly unusual, the Commission has addressed this precise situation before. Two concurrent decisions involving the allegedly inconsistent applications of Wabash Valley Broadcasting Corp. ("Wabash") are directly on point. See Wabash Valley Broadcasting Corp., 18 Rad. Reg. (P&F) 559 (1959) (Wabash I); and Wabash Valley Broadcasting Corp., 18 Rad. Reg (P&F) 562 (Wabash II) (1959). At the time of these decisions, Wabash, like the Smiths here, was pursuing two authorizations to offer television service to the same community at the same time: a new authorization[3] for Channel 2 in

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[2] Section 73.3555(a) bars an applicant from owning and operating two television stations in the same market. 47 C.F.R. § 73.3555(a).

[3] That Wabash's Channel 2 application was one for a new facility is evident by its file number, BPCT-2293, a type number assigned exclusively to applications for new stations. As discussed below, this is confirmed by the Commission itself in its discussion of the meaning of this case in Southern Keswick, Inc., 34 F.C.C.2d 624, 625 (1972).

Terre Haute; and the renewal of its existing license to serve that same community on Channel 10.

Wabash, however, was unluckier than the Smiths and found itself in two comparative hearings: a comparative renewal hearing with respect to Channel 10; and a standard comparative hearing with respect to its application for the new facility on the then unoccupied Channel 2. The other parties in both proceedings sought the dismissal of one of Wabash's applications under the inconsistent application rule. While the Commission declined to require such dismissal, it unmistakably confirmed that the inconsistent application rule is intended to apply in the renewal application context. Further, the express basis for its holding is fatal to the Four Jacks application.

The sole fact which saved the Wabash applications is that, unlike Four Jacks' owners, Wabash pursued both its applications through the same company. This alone saved the applications because the Commission was able to determine for itself that:

> although the application was called an application for a <u>new</u> station to operate on Channel 2, it was really a modification from Channel 10 to Channel 2 which, if granted, would leave Channel 10 open for new applications.

<u>Southern Keswick, Inc.</u>, 34 F.C.C.2d at 625 (explaining the <u>Wabash</u> decision) (emphasis in original). The <u>Wabash Valley</u> Commission explained its basis for rejecting the arguments that the Wabash applications were inconsistent as follows:

> [Wabash's application for Channel 2] is an application for a change in facilities, and hence, if granted, would serve to vacate any

> grant to Wabash of its Channel 10 application. Wabash's two applications are not therefore "inconsistent or conflicting" within the meaning of [§ 73.3518][4] of the Rules.

Wabash Valley II, 18 Rad. Reg at 568 (emphasis added).

The Wabash Valley Commission further stated that this, the sole basis offered for its holding, is the reason "the Wabash applications are not per se inconsistent or conflicting." Wabash Valley I, 18 Rad. Reg. at 562 (emphasis added).

C. The staff's order is in conflict with Commission precedents holding that a promise to divest cannot mitigate a violation of the inconsistent application rule.

The HDO relies on the Smiths' promise to divest their interests in Channel 45 should they be successful in attaining Channel 2. Initially it is noted that the HDO's argument must assume that the Smiths' divestiture promise would have extended to terminating their inconsistent renewal application for Channel 45 if they had won authority to operate Channel 2 while that renewal application was still pending. If this is not the case--and their counsel denied that the divestiture promise applied to the renewal application, see Opposition to the Petition to Dismiss at 5--the divestiture promise should not be considered at all because it is plainly irrelevant to the merits of Scripps Howard's argument. Scripps Howard's Petition addresses only the inconsistent application issue, not some general question regarding ultimate compliance with the multiple ownership rule. The contrary suggestion about Scripps Howard's position in the HDO is further evidence of the ineptness of that decision. The Commission itself restated the importance of this distinction recently in Treasure Coast Media, Inc., 7 F.C.C. Rcd. 5533 at ¶ 4 (1992).

The Commission has repeatedly considered the matter of divestiture promises and Section 73.3518--on one occasion in a case involving the interests of the president of Four Jacks, David D. Smith--and it has always held that a pledge to divest a majority

application rule. See, e.g., Big Wyoming Broadcasting Corp., 2 F.C.C. Rcd. 3493, 3494 (1987); Valley Broadcasting Co., 58 Rad. Reg. 2d (P&F) 945, 947-48 (1985); and Comark Television, 51 Rad. Reg. 2d at 741 (involving Mr. Smith's interests). Only where the application interests to be divested are minority, non-controlling interests has the Commission determined that the rule by its terms does not apply and then permitted a divestiture promise to permit continued processing of the application. Id.

As noted above, the interests of the Smith brothers in these two inconsistent applications are identical. Each of the four brothers owns 25%, totalling 100% of the controlling interests. While the applicants are different corporations, they are necessarily the same applicant for the purposes of the inconsistent application rule, and accordingly no divestiture promise could suffice to save the Four Jacks application. Id.

D. The staff's order is in conflict with Commission